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No. 09-220

Supreme Court, U.S.
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In The
Supreme Court of the United States

THOMAS WARREN WHISENHANT,

Petitioner,

v.

RICHARD ALLEN, Commissioner of the Alabama Department of Corrections,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO THE BRIEF IN OPPOSITION

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Contrary to the contention of the State of Alabama, this case involves the application of long-established, bedrock principles of constitutional law: first, that due process requires a trial before a tribunal free from the probability of bias; and second, that this right is violated when the judge has an interest in obtaining a conviction or takes on the role of the prosecutor and judge in the same case. In this case, the uncontested facts demonstrate that these violations occurred and that the State tried to cover them up. The trial judge in this very high-profile murder case had sentenced the defendant to death twice and faced the embarrassment of being twice reversed. During the third trial, the judge colluded, *ex parte,* with prosecutors to paper over error in the second trial in order to preclude the possibility of reversal during habeas. The judge's interest in obtaining a conviction and the probability of bias were clear. This Court should not allow a death sentence to stand under such circumstances.

1. The case law upon which Mr. Whisenhant relies is not new; it was clearly established long before his trial. As this Court has held, "[R]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). It has long been established that "a fair trial in a fair tribunal is a basic requirement of due process," and that this requirement is violated, not only when the judge's actual bias is proven, but also where there is "even

the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). In the Court's jurisprudence, appearances are important: "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Consequently, due process does not allow a judge "to try cases where he has an interest in the outcome," regardless of whether the evidence establishes actual bias. *Id.*

Contrary to the State's position, this Court has never limited this generalized due process standard by defining an exclusive list of circumstances in which a judge can be said to have an unconstitutional interest in the outcome. Instead, the Court has opined, "[I]nterest [in the outcome] cannot be defined with precision. Circumstances and relationships must be considered." *Id.* Among the many circumstances in which the Court has found an unconstitutional probability of unfairness are where the judge has an interest in obtaining a conviction, and where the judge takes on the role of prosecutor and judge in the same case. *Murchison*, 349 U.S. at 137. Such a situation occurred here when Judge McRae joined with the prosecution *ex parte* to prevent future reversal and ensure that Mr. Whisenhant would be executed. While Mr. Whisenhant's life hung in the balance, judicial integrity, "a state interest of the highest order," was severely compromised. *Caperton v. A.T. Massey Coal Co.*, ___ U.S. ___, 129 S. Ct. 2252, 2267 (2009) (citation omitted).

2. The State of Alabama does not contest the fact that Judge McRae knew that the prosecution was providing him, *ex parte,* with a proposed order written by then-Assistant Attorney General Ed Carnes. By entering Mr. Carnes' *ex parte* proposed order, Judge McRae stepped beyond the role of neutral arbiter and became an advocate for execution.

The *ex parte* draft Mr. Carnes wrote for Judge McRae contained a lengthy attempt to justify the denial of funds during the second trial years earlier. The issue regarding the second trial was not before the court; this unnecessary discussion was designed solely to ensure that Mr. Whisenhant's conviction would withstand future habeas review. Rather than simply rule on the request that was before him, Judge McRae, with the *ex parte* assistance of Mr. Carnes, took on the prosecutorial role of trying to ensure that Mr. Whisenhant would be executed. With this act of *ex parte* collusion, Judge McRae crossed the line from judge to advocate for the prosecution. This partisan judicial behavior eviscerated the "appearance of justice" and denied Mr. Whisenhant due process of law.

3. The State argues that, regardless of the *ex parte* collusion, Judge McRae's decision to grant the defense $2200 in funds in the order drafted by Mr. Carnes precludes a finding of unconstitutional bias. The granting of funds for the third trial does not prove a lack of bias: it reflects the fear that denial of expert funds would cause a later reversal and the desire to preserve the conviction. Indeed, the order

explained that the defense was not entitled to funds, but granted them anyway. The decision furthered the overall purpose of the *ex parte* order: error-proofing the record to avoid another embarrassing retrial. It would make no sense to spend time papering over one error while taking the chance of introducing a new one.

Avoiding error was the express reason that Ed Carnes was involved in the case at all. At the time of the 1987 retrial, now-Judge Carnes was the head of the death penalty unit in the Alabama Attorney General's Office. Prior to the start of the 1987 retrial, then-Attorney General Don Siegelman issued a press release announcing that he was appointing a special prosecution team for the case, and in particular was assigning Assistant Attorney General Carnes to the case "to insure that no technical or reversible errors are made in the state's presentation of the case." (R. at Vol. 31, p. 2122.) Siegelman expressly did this to fulfill a campaign promise "to hire the best possible prosecutors and work closely with the District Attorneys" and "to make this retrial the last one for Thomas Whisenhant." (R. at Vol. 31, p. 2121-22.)

Given the surrounding circumstances and the tenor of the order, it is facetious to suggest that Judge McRae's partial grant of funds requested by the defense shows a lack of bias. All it shows is a determination to see Whisenhant executed.

4. The State also does not contest the obvious and embarrassing fact that current Eleventh Circuit

Judge Carnes – prior to his appointment to the bench – hid the evidence of his *ex parte* contacts with Judge McRae after being ordered to open the prosecution file for discovery during state habeas proceedings. Instead, the State tries to minimize this shockingly unethical conduct by denying that Judge Carnes ever served as the lead lawyer for the prosecution. (Brief in Opposition at 8, n.2.) This claim is indisputably false.

As the State is aware, District Attorney Galanos testified during the habeas corpus proceedings that Judge Carnes served as the "lead attorney" on the prosecution for the 1987 retrial and "was basically calling the shots." (R. at Vol. 37, p. 47.) Indeed, although the case was based in Mobile, the litigation file was kept more than a two-hour drive away in Montgomery, at the Attorney General's Office where Carnes worked. (R. at Vol. 37, p. 47-8.) And as mentioned above, then-Attorney General Siegelman issued a press release announcing that Carnes would work on the case to ensure that no legal errors were committed. Having tried to hide the evidence of its *ex parte* contacts, the State should not be heard to minimize the significance of the transgressions that occurred here.

5. The judge's neutrality is nowhere more important than in an Alabama death penalty case in which judges, not juries, make the ultimate decision of whether a defendant will live or die. In such a case, the judge's role goes beyond merely deciding questions of law; the judge is the fact-finder who

weighs whether the aggravating circumstances outbalance the mitigating ones. In this case, the judge was presented with substantial evidence that Mr. Whisenhant's severe mental illness led to his crimes. Judge McRae faced the most controversial, important, and morally challenging decision any judge can be called upon to make. A justice system that allows a decision of this magnitude to be made by a judge infected with bias against the defendant deserves the greatest condemnation.

Certiorari should be granted to review the decision below.

Respectfully submitted,

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